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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 613

SEVER-WILLIAMS COMPANY, INC., and FEDERAL INSURANCE COMPANY, *Petitioners*

v.

THE BOARD OF EDUCATION OF THE CHILLICOTHE CITY SCHOOL DISTRICT, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

PAUL E. McNULTY
1320 Nineteenth Street, N. W.
Washington, D. C. 20036
Counsel for Petitioners

Of Counsel:

JOHN A. McWHORTER
JOSEPH M. ZORC
KING & KING
Washington, D. C.

J. PAUL McNAMARA
McNAMARA and McNAMARA
Columbus, Ohio

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

The petitioners, Sever-Williams Company, Inc. and Federal Insurance Company, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Ohio Supreme Court entered in this cause on May 6, 1970.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio, reported at 22 Ohio St. 2d 107, appears in the Appendix hereto. The opinion of the Ross County, Ohio, Court of Appeals, reported at 240 N.E. 2d 880 and 16 Ohio App. 2d 7, and the unreported opinion of the Court of Common Pleas, Ross County, Ohio, also appear in the Appendix.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on May 6, 1970. A timely motion for rehearing was denied by an order entered on June 3, 1970, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. May the State of Ohio constitutionally enforce an unconscionable bargain by denying relief from mistake in bid to a low bidder for a school construction contract, when no other state or federal contracting authority denies a bidder for a public contract all possibility of relief from his mistaken bid?

2. May the State of Ohio constitutionally require a forfeiture under a bid bond, in the case of a substantial mistake in bid for a school construction contract, without administrative or judicial consideration of the circumstances and nature of the mistake?

STATUTORY PROVISION INVOLVED

Ohio Revised Code, § 3313.46 (procedure for bidding and letting of contracts), and particularly subsections (D) and (F) thereof, which is reproduced in the Appendix hereto. The provisions here at issue were in effect in June 1961, when this controversy arose, and remain substantially unchanged at the present time.

Petitioners rely upon Amendment XIV of the Constitution of the United States in seeking review by certiorari.

STATEMENT OF THE CASE

This action was instituted by the Board of Education of Chillicothe, Ohio, against the apparent low bidder (Sever-Williams, an Ohio corporation) for the construction of a new Chillicothe high school and against its surety (Federal Insurance Co.) on a statutory bid bond. The Board of Education sought to collect the full $137,000 amount of the bid bond plus interest and costs, due to the refusal of Sever-Williams to enter into the construction contract for which it had bid.

Defendants (co-petitioners here) admitted the refusal to execute the contract, but cross-petitioned for rescission of the bid and bid bond, alleging that plaintiff had timely notice of a $145,000 mistake in Sever-Williams' bid due to the inadvertent omission of a major subcontract item, and that plaintiff, after notice of this error and after the refusal of Sever-Williams to perform under the mistaken bid, had then awarded the construction contract to the second-low bidder (Knowlton), whose base bid was $141,500 higher than Sever-Williams' $1,242,000 erroneous base bid. The pleadings and proof showed that the Sever-Williams bid had been submitted immediately prior to the bid opening on June 20, 1961, that the notice of mistake was given orally on June 20th and confirmed in writing on June 21st, and that the school board elected to award the contract to the second-low bidder on June 27, 1961. The school board's suit on the bid bond was filed on February 10, 1962.

Additional facts developed at the three-day trial in June 1966, showed that the bids had been opened at approximately noon on the scheduled bid opening day in a school auditorium by a Mr. Cupp, an employee of

the architectural firm for the board of education. When Mr. Puckett, the Sever-Williams representative at the bid opening, noticed the $141,500 disparity between the bids of Sever-Williams and Knowlton, who had previously been close competitors for Ohio school construction contracts, and the minor difference ($28,220) between Knowlton and third-low bidder, he suspected that there must have been an error and immediately telephoned his office to inquire. Upon checking the work sheets, it was discovered that a last-minute changed quotation for "Flexicore" precast concrete slabs and "Flexicast" precast concrete beams and columns, specialty items required by the project specifications, had been inadvertently omitted from the final bid computation. The omitted $145,000 subcontract item amounted to approximately 12% of the erroneous Sever-Williams base bid, substantially exceeded the projected 1½% net contract profit, and also amounted to considerably more than the net worth of the contractor.

In the meantime, the school board had immediately reconvened in a smaller meeting room to discuss the bids which had been received. Approximately one hour after the bids had been opened, during a recess in that adjourned meeting, Mr. Puckett informed Mr. Cupp of the nature and amount of the error. Mr. Cupp testified that he had suspected an error because of the substantial difference between the Sever-Williams bid and the other bids, and further testified that he believed Mr. Puckett's allegation of error, on the basis of their past relations on other jobs. Mr. Cupp informed the board members who were present, and when the school board meeting resumed, the allegation of error was the "main point" of the discussion, accord-

ing to Mr. Cupp, although the board members who testified denied that the board had considered the allegation of error at this meeting.

The minutes of this June 20, 1961 Board of Education meeting reflect that the board voted to award the contract to Sever-Williams in the amount of its erroneous base bid. Subsequently, Sever-Williams confirmed the oral notice of the mistake in bid by a telegram dated June 21, 1961, by a letter dated June 21, 1961, by a telegram dated June 26, 1961, and by the appearance of a representative of Sever-Williams at a school board meeting on June 27, 1961 to present a corporate resolution refusing to proceed with the contract on the basis of the erroneous bid. The school board thereupon voted to award the high school construction contract to the second-low bidder at this June 27th meeting. The board's suit is upon the bid bond of $137,000 (10% of the amount of the base bid plus all additive options), which bond is specifically required by subsection (D) of the statute (O.R.C. § 3313.46, *infra*, p. 1a).

At the conclusion of the presentation of all the evidence before a jury, the trial court (in an opinion reproduced *infra*, pp. 3a to 6a) directed a judgment in favor of the defendants upon their cross-petitions, dismissed the plaintiff's petition, and ordered the rescission of the bid and bid bond, thus fully sustaining the equitable defense predicated upon mistake in bid. The Court of Appeals of Ross County sustained the action of the trial court in an opinion (*infra*, pp. 6a to 15a) which stressed the actual and constructive notice of mistake given through Mr. Cupp and which also referred to and discussed the "plethora of cases" (Appendix, p. 12a) justifying the action of the trial court under the circumstances of this case.

The Ohio Supreme Court reversed both lower courts, in an opinion (*infra*, pp. 16a to 25a) finding that the implied intent of the legislature and public policy dictated that public contract bids be irrevocably firm to the extent that any consideration of equitable or administrative relief from mistake must be precluded. Accordingly, the Ohio Supreme Court ordered the cross-petitions of both defendants to be dismissed and entered final judgment in favor of the plaintiff.

In both appellate proceedings below, defendants (petitioners here) had relied upon the findings and conclusions of the lower courts and upon the great weight of authority which had theretofore sustained equitable relief in appropriate bid mistake cases. Thus, it was not until after the Ohio Supreme Court's unprecedented opinion in this case that petitioners first raised due process and equal protection issues under the Fourteenth Amendment to the United States Constitution in the context here presented, although it may be noted that somewhat converse arguments had been made throughout the course of all the proceedings below by the plaintiff.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With the Decision of This Court in Moffett, Hodgkins & Clarke Co. v. Rochester and With the Great Weight of Subsequent Practice and Authority Which Has Granted Relief, Where Equitable, to a Bidder for a Public Construction Contract Who Has Made a Material Mistake in Bid.

In the decision below the Ohio Supreme Court has held that the bid bond provision of the Ohio statute is absolute and permits no relief in the case of a substantial, material mistake in bid. The bases for this determination are the Court's determination of public

policy and its implication from the statutory provision.[1] No court has heretofore denied the possibility of relief from mistake to a bidder for a public construction contract:

> In the typical situation here presented, so firmly has the rule favoring equitable relief against unilateral mistake become established that no case has been discovered in which it has not been granted, by way of rescission or similar or appropriate relief, where there is a combination of circumstances establishing remediable mistake and timely communication of knowledge to and assertion of the right to relief against the other party.

(Anno., Rights and Remedies of bidder for public contract who has not entered into a contract, where bid was based on his own mistake of fact or that of his employees, 52 ALR2d 792, 796 (1957).)

The leading case is this Court's decision in *Moffett, Hodgkins & Clarke Co. v. City of Rochester*, 178 U.S. 373 (1900), where this Court considered the precise issue which is involved in this petition—availability of relief to a public construction contract bidder who has made a material pricing error in his bid—and decided that issue in favor of affording relief to the mistaken bidder. There, Moffett used incorrect unit prices in calculating its bid, and the City of Rochester sought to compel execution of the contract by Moffett, on the basis of a city charter provision which *explicitly* prohibited withdrawal or cancellation of a bid or bid bond. Moffett refused to execute a contract based on the erroneous bid and subsequently brought suit, seeking

[1] The Ohio statute (quoted in full, *infra*, pp. 1a to 2a) does not explicitly state the rule nor require the result arrived at by the Ohio Supreme Court.

reformation or rescission, and the trial court ordered the bid and bid bond rescinded. The intermediate appellate court reversed, but this Court granted certiorari, held that equitable relief must be afforded to the mistaken bidder, and affirmed the action of the trial court in rescinding both the bid and bid bond.

With respect to the principal contention, that the city charter "firm bid" [2] provision was binding even in the case of a mistaken bid, this Court found the provision to be

> * * * A perfectly proper provision, but as was said by the learned Circuit [trial] Court:
>
> "... If the defendants are correct in their contention there is absolutely no redress for a bidder for public work, no matter how aggravated or palpable his blunder. The moment his proposal is opened by the executive board he is held as in a grasp of steel. There is no remedy, no escape. If, through an error of his clerk, he has agreed to do work worth a million dollars for ten dollars, he must be held to the strict letter of his contract, while equity stands by with folded hands and sees him driven to bankruptcy. The defendant's posi-

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[2] The "firm bid" requirement in public contract law departs from the general rule that an offer is revocable prior to acceptance. In the case of bids for public construction contracts, in order to allow for due consideration by the public authorities of the bids submitted and for adequate time to investigate the responsibility of the low bidder, it is frequently provided by statute, by regulation, or by the bid documents, that the bids must remain firm and irrevocable after the scheduled opening of bids, at least for a specified period of time.

Petitioners have never disputed the Ohio "firm bid" rule, except insofar as the decision by the Ohio Court herein has eliminated the equitable exception to this rule which has prevailed throughout the United States; see authorities cited *infra*, nn. 3, 8, 9, and 10.

tion admits of no compromise, no exception, no middle ground."

These remarks are so apposite and just it is difficult to add to them. * * *

(178 U.S. at 386; compare the opinion of the trial court herein, *infra*, pp. 3a to 6a).

Thus, the Ohio Court has come into conflict with this Court's decision in *Moffett, supra;* and with the very great weight of authority before and since *Moffett*. The issue has been presented for decision in numerous states,[3] and the highest courts of those states have vir-

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[3] ALABAMA: *Townsend* v. *McCall;* 262 Ala. 554, 80 So.2d 262 (1955), *Board of Water & Sewer Comm'rs. of Mobile* v. *Spriggs*, 274 Ala. 155, 146 So.2d 872 (1962); CALIFORNIA: *Kemper Const. Co.* v. *Los Angeles*, 37 Cal.2d 696, 235 P.2d 7 (1951); *Elsinore Union Elementary School Dist.* v. *Kastorff*, 54 Cal.2d 380, 6 Cal. Rptr. 1, 353 P.2d 713 (1960); CONNECTICUT: *Geremia* v. *Boyarsky*, 107 Conn. 387, 140 Atl. 749 (1928), *State of Connecticut* v. *F. H. McGraw & Co.*, 41 F.Supp. 369 (D.Conn. 1941); FLORIDA: *State Board of Control* v. *Clutter Const. Corp.*, 139 So.2d 153 (Fla.App. 1962), *cert. denied*, 146 So.2d 374 (Fla.S.Ct. 1962), *Hotel China & Glass Co.* v. *Board of Public Instruction*, 130 So.2d 78 (Fla. App. 1961); GEORGIA: *State Highway Dept. of Georgia* v. *MacDougald Const. Co.*, 54 Ga.App. 310, 187 S.E. 734 (1936), *Peerless Cas. Co.* v. *Housing Authority of Hazelhurst, Ga.*, 228 F.2d 376 (5th Cir. 1955); IDAHO: *Boise Junior College Dist.* v. *Mattefs Const. Co.*, 92 Idaho 757, 450 P.2d 604 (1969); ILLINOIS: *Bromagin & Co.* v. *City of Bloomington*, 234 Ill. 114, 84 N.E. 700 (1908); INDIANA: *Board of School Comm'rs. of City of Indianapolis* v. *Bender*, 36 Ind.App. 164, 72 N.E. 154 (1904); IOWA: *M. J. McGough Co.* v. *Jane Lamb Memorial Hosp.*, 302 F.Supp. 482 (S.D.Iowa 1969); KENTUCKY: *Board of Education, Floyd County* v. *Hooper*, 350 S.W.2d 629 (1961); MARYLAND: *Baltimore* v. *DeLuca-Davis Constr. Co.*, 210 Md. 518, 124 A.2d 557 (Md. 1956), *Mount St. Mary's College* v. *Aetna Casualty & Surety Co.*, 233 F.Supp. 787 (D.Md. 1964); MICHIGAN: *Kutsche* v. *Ford*, 222 Mich. 442, 192 N.W. 714 (1923), *Union & People's Natl. Bank* v. *Anderson-Campbell Co.*, 256 Mich. 674, 240 N.W. 19 (1932);

tually unanimously held that the mistaken bidder is entitled to relief in equity, with his bid to be cancelled or the agreement rescinded and the bid bond returned, where the circumstances so dictate, notwithstanding the fact that in many of these cases *explicit* "firm bid" provisions were at issue.

In only two states other than Ohio have the courts held that a mistaken bidder may not be afforded relief in equity, but neither of these states now totally denies a mistaken bidder all relief, as would Ohio. In Massachusetts, the highest court held that the bid bond or bid deposit must be forfeited (although rescission was per-

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MINNESOTA: *St. Nicholas Church* v. *Kropp*, 135 Minn. 115, 160 N.W. 500 (1916); MISSISSIPPI: *Hattiesburg* v. *Cobb Bros. Const. Co.*, 174 Miss. 20, 163 So. 676 (1935); NEBRASKA: *School Dist. of Scottsbluff* v. *Olson Const. Co.*, 153 Neb. 451, 45 N.W.2d 164 (1950); NEW HAMPSHIRE: *Curran* v. *State*, 215 A.2d 702 (N.H. S.Ct. 1965); NEW JERSEY: *Conduit & Foundation Corp.* v. *Atlantic City*, 2 N.J. Super. 433, 64 A.2d 382 (1949); NEW MEXICO: *Smith & Lowe Const. Co.* v. *Herrera*, 79 N.M. 239, 442 P.2d 197 (N.M. 1968); NEW YORK: *New York* v. *Dowd Lumber Co.*, 140 App.Div. 358, 125 N.Y.S. 394 (1910), *New York* v. *Scely-Taylor Co.*, 149 App.Div. 98, 133 N.Y.S. 808 (S.Ct.App.Div. 1912), *Martens* v. *Syracuse*, 183 App.Div. 622, 171 N.Y.S. 87 (S.Ct.App.Div. 1918) and many more recent decisions, *e.g.*, *Union Free School Dist. No. 1, Town of Islip, Suffolk County* v. *Gumbs*, 191 N.Y.S.2d 183, 20 Misc.2d 315 (S.Ct.Suffolk Co. 1958); OREGON: *Rushland Automatic Sprinkler Co.* v. *Portland*, 189 Ore. 194, 219 P.2d 732 (1950), *State Highway Comm.* v. *State Constr. Co.*, 203 Ore. 414, 280 P.2d 370, 52 ALR2d 779 (1955); TENNESSEE: *Lexington Housing Auth.* v. *Continental Casualty Co.*, 210 F.Supp. 732 (W.D.Tenn. 1962); TEXAS: *Jordan* v. *Beaumont*, 337 S.W.2d 115 (Tex.Civ.App. 1960), *James T. Taylor & Son, Inc.* v. *Arlington Independent School Dist.*, 160 Tex. 617, 335 S.W.2d 371 (1960); UTAH: *State* v. *Union Const. Co.*, 9 Utah 2d 107, 339 P.2d 421 (1959); WASHINGTON: *Puget Sound Painters, Inc.* v. *State*, 45 Wash.2d 819, 278 P.2d 302 (1954); WISCONSIN: *Gavahan* v. *Shorewood*, 200 Wis. 429, 228 N.W. 497 (1930).

mitted),[4] but this rule was overturned by the legislature,[5] so that by explicit amendment to the pertinent statute, a mistaken bidder is now entitled to consideration of full relief in Massachusetts, both administratively and judicially. The Pennsylvania Supreme Court has held, upon the basis of public policy, that the Pennsylvania "firm bid" statute binds a mistaken bidder to his bid and that he may not obtain judicial relief,[6] and this was the only case cited by the Ohio Court in support of the instant decision[3] (see, *infra*, at p. 25a). However, in a subsequent case,[7] which was not cited by the Ohio court, the Pennsylvania Supreme Court held that the statute does not impose a mandatory duty upon the contracting authorities and that they may grant relief to a mistaken bidder, which he is otherwise denied judicially in Pennsylvania.

The large dollar-volume of Federal Government procurement is based upon policies which tend to serve as a model for the state and local authorities. The well-

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[4] *John J. Bowes Co.* v. *Inhabitants of Town of Milton*, 255 Mass. 228, 151 N.E. 116 (1926), *Dadario* v. *Town of Milford*, 296 Mass. 92, 5 N.E.2d 23 (1936).

[5] By amendment in *General Laws*, 1961, c. 604 §§ 1, 2 to the Massachusetts codified statutes, c. 149, § 44B(2), regarding public contract bidders: "... and provided further that, in case of death, disability, bona fide clerical or mechanical error of a substantial nature, or other unforeseen circumstances affecting the general bidder, his bid deposit shall be returned to him."

Idenfical provision was made in subsection (3) of the codified statute with reference to sub-bidders.

[6] *Colella* v. *Allegheny County*, 391 Pa. 103, 137 A.2d 265 (1958); see also *Heddon* v. *Northampton Area Joint School Authority*, 396 Pa. 328, 152 A.2d 463 (1959) and *Modany* v. *State Public School Building Authority*, 417 Pa. 39, 208 A.2d 276 (1965).

[7] *Fralin* v. *Lincoln University*, 428 Pa. 436, 239 A.2d 306 (1968).

established policy favoring relief upon a proper showing of mistake in bid is now set forth in detailed regulations governing and requiring administrative consideration of relief,[8] and the judicial remedy is overwhelmingly established.[9]

The rule affording the possibility of judicial relief to bidders upon public construction contracts who have made material, non-fraudulent mistakes in bids is well recognized among the secondary authorities.[10]

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[8] Armed Services Procurement Regulation, 32 C.F.R. § 2-406 (1970); Federal Procurement Regulations, 41 C.F.R. § 1-2.406 (1970).

See Welch, *Mistakes in Bids*, 18 F.B.J. 75 (1958), for the background of these regulations, including review by the Comptroller General of the United States. Also, see the excellent review and summary of the federal law in Doke, *Mistakes in Government Contracts*, 18 Sw. L.J. 1 (1964).

[9] *E.g.*, *Nason Coal Co.* v. *U.S.*, 64 Ct.Cl. 526 (1928); *Alta Electric & Mechanical Co.* v. *U.S.*, 90 Ct.Cl. 466 (1940); *Rappoli* v. *U.S.*, 98 Ct.Cl. 499 (1943); *Leitman* v. *U.S.*, 104 Ct.Cl. 324, 60 F.Supp. 218 (1945); *Refining Assocs., Inc.* v. *U.S.*, 124 Ct.Cl. 115, 109 F.Supp. 259 (1953); *U.S.* v. *Lipman*, 122 F.Supp. 284 (E.D.Pa. 1954); *Rhode Island Tool Co.* v. *U.S.*, 130 Ct.Cl. 698, 128 F.Supp. 417 (1955); *Chernick* v. *U.S.*, 178 Ct. Cl. 498, 372 F.2d 492 (1967); *Ruggiero* v. *U.S.*, 420 F.2d 709 (Ct.Cl. No. 338-67, Jan. 23, 1970); and *Chris Berg, Inc.* v. *U.S.*, 426 F.2d 314 (Ct.Cl. No. 235-68, May 15, 1970).

[10] *E.g.*, 13 Am. Jur. 2d, *Building and Construction Contracts*, § 107, Anno., Rights and Remedies of bidder for public contract who has not entered into a contract, where bid was based on his own mistake of fact or that of his employees, 52 ALR 2d 792 (1957), Anno., Surety's Liability on bid bond for public works, 70 ALR 2d 1370 (1960).

With particular reference to local public contract law, see 63 C.J.S. *Municipal Corporations*, § 1152(b), esp. at nn. 75, 79, and 80; 10 McQuillen, *Municipal Corporations*, § 29.82 (3rd ed. 1966); and 1 Anticau, *Municipal Corporation Law*, § 10.42.

Accordingly, the instant decision of the Ohio court departs from *Moffett, supra,* and from the overwhelming[11] weight of federal, state, and local authority. Inasmuch as the Pennsylvania court has reserved the possibility of administrative consideration of relief, Ohio is the only state which would presently afford *no* possibility of relief (judicial or administrative) from mistake in bid for public contract work.

Heretofore, since the equitable principle enunciated in *Moffett* has been followed in virtually all cases wherein the issue of relief for a mistaken public contracts bidder has been presented, it has not been necessary to seek constitutional remedies for a problem which equity has so readily resolved. In the instant case, however, the Ohio court has dismissed the cross-petition of the defendants (petitioners here) and entered judgment for plaintiff, upon a very broadly enunciated rule barring any relief as a matter of policy and statutory interpretation (by implication), and not upon the particular circumstances of the instant case. The Ohio court, therefore, has now added a condition to public contract bids which runs contrary to the overwhelming weight of authority within the United States.[12]

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[11] In a well-researched recent opinion in a case bearing close factual similarity to the instant controversy, the District Court in Iowa found that the rule favoring an equitable remedy to relieve from mistake in a public contracts bid is based upon "the overwhelming weight of authority," *M. J. McGough* v. *Jane Lamb Memorial Hospital*, 302 F.Supp. 482, 485 (S.D. Iowa 1969).

[12] That the decision of the Ohio court imposes an added condition is clear from the concurring opinion (*infra*, p. 25a) of Justice Schneider, who dissented from the rule announced in the official syllabus on the ground that it "overturns a long-standing rule followed in many political subdivisions in Ohio as expressed by

Against this background, therefore, this Court must now consider whether the decision below should be reviewed to determine if an unconstitutional condition has been imposed. The principle of unconstitutional conditions, to the effect that no Government may impose an unconstitutional condition upon a privilege (such as obtaining a public contract), is well established.[13] There has been some judicial consideration in a quite closely analogous context; see *Merco Const. Eng., Inc.* v. *Los Angeles Unified School Dist.*, 79 Cal. Rptr. 23, 30-33 (C.A. 2d Disf. 1969).

Petitioners submit that the decision below deserves review by this Court to determine whether the condition implied from the Ohio statutory bid requirement constitutionally prohibits the possibility of any relief

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Toledo v. *Schulters* (1896), 11 C.C. 528, and *Ferro Concrete Const. Co.* v. *Board of Education of Cincinnati* (1911), 11 N.P. (N.S.) 86."

At the trial herein, unrebutted testimony which was accepted by the trial court and the intermediate appellate court showed that the two largest contracting authorities in the State of Ohio (Dept. of Highways and Dept. of Public Works) both allowed equitable relief to mistaken bidders as a matter of administrative practice. Further proof was adduced that another school board had granted relief (cancellation of bid) to petitioner Sever-Williams in the case of a similar mistake in bid in the previous year.

[13] *E.g.*, *Tinker* v. *Des Moines School Dist.*, 393 U.S. 503 (1969), *North Carolina* v. *Pearce*, 395 U.S. 711 (1969). See the good thumbnail sketch of the development of the principle of unconstitutional conditions at 614-615 in VanAlstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 Yale L.J. 606 (1965); see, generally, Note, *Unconstitutional Conditions*, 73 Harv.L.Rev. 1595, esp. at 1602-1604 (1960).

Note, particularly, that since *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 130 (1940), the "privilege" of bidding for and obtaining a public contract has become rather more of a "right." *Stanwell Labs., Inc.* v. *Shaffer*, 424 F.2d 859 (D.C.Cir. No. 22,863, Feb. 13, 1970) and *Keco Indus., Inc.* v. *U.S.*, — F.2d — (Ct.Cl. No. 173-69, July 15, 1970).

from mistake in bid in the face of the equitable principles enunciated in *Moffett* which have become engrained within American jurisprudence. Petitioners suggest that an issue of constitutional dimensions is present and deserves review, particularly in view of the statutory forfeiture impending in the instant case.

2. The Decision Below Denies Substantive and Procedural Due Process to Petitioners, and Prospectively To Those Similarly Situated, and Will Cause an Unconstitutional Forfeiture.

Even without regard to the equitable rule whereby mistaken bidders for public construction work have been so uniformly afforded relief heretofore (discussed *supra*), the decision below requires review inasmuch as it unavoidably violates a fundamental principle of justice in the case of both petitioners (and, prospectively, those similarly situated), in that the application of the bid bond statutory provisions, as interpreted below, will clearly violate due process of law.

Substantive due process is violated, because the statute as interpreted by the Ohio court is arbitrary and unreasonable, and bears no rational relation to a constitutionally permissible objective. Analysis of the statute's operation will reveal that the forfeiture will be a function of two factors unrelated to the actual damage suffered, *viz.*, the amount of the forfeiture will depend principally upon the dollar value of the mistake, limited by the amount of the bid bond or bid deposit required, which is itself unlimited [14]—whereas in fact the only

[14] Subsection (D) of the statute (quoted, *infra*, pp. 1a and 2a) requires that the bid bond or bid deposit be not less than 5% of the amount of the bid, and authorizes the contracting authority to designate any higher amount than 5%.

In the instant case, the board required a 10% bid bond, which works to petitioners' slight ($4,500) advantage in this litigation,

"loss" may be the loss of an unconscionably good bargain (performance of work at an inadequate price). The Ohio court justified its holding by a public policy pronouncement that the integrity of the system of competitive, firm bidding must be preserved. However, virtually all of the courts which have considered the equitable issue have explicitly rejected this very argument; see, *e.g.*, the oft-cited decision on this point by Circuit Judge Clark (sitting as a District Judge) in *State of Connecticut* v. *F. H. McGraw & Co., supra;* n. 3, 41 F.Supp. at 373-374, finding that to grant relief in this type of case will not result in any substantial impairment of the bidding system.

The decision below also violates a number of very fundamental procedural due process principles. Failure to give notice violates "the most rudimentary demands of due process of law," *Armstrong* v. *Manzo,* 380 U.S. 545, 550 (1965). Here, the school board gave no notice to petitioners of the action which it intended to take (forfeiture of the bid bond and award to second-low bidder), and there is no requirement of notice

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where the error amounted to $145,000, the difference between the erroneous bid and the second-low bid was $141,500, and the bid bond amounted to only $137,000, since the board of education has sued only for the full amount of the $137,000 bid bond, rather than the "increased cost" of $141,500.

The fundamental unfairness and full, irrational impact of the decision below can be best appreciated by considering this Court's example in *Moffett, supra,* 178 U.S. at 386, of a bidder whose clerk mistakenly binds him to perform one million dollars' work for ten dollars. If one hypothesizes that a shrewd Ohio school board will take advantage of the decision below and of the no-maximum-limitation bond statute by requiring a 100% bid bond for a million-dollar school, then, if this Court's example of a mistake were to materialize, the school board would obtain a million-dollar school for $10, while the contractor whose clerk made the mistake in the bid would bear the $999,990 loss.

which can be found in the decision below, with reference to future statutory bid bond forfeitures. "A fair trial in a fair tribunal is a basic requirement of due process," *In re Murchison*, 349 U.S. 133, 136 (1955), quoted in *Holt* v. *Virginia*, 381 U.S. 131 (1965). Under the instant decision, the only "trial" which petitioners will have received with reference to the mistake in bid issue will have been the brief appearance of a Sever-Williams representative before the Board of Education, which therefore will have judged its own case. Even this "trial" would be eliminated in future bid bond forfeitures, inasmuch as the decision below imposes a mandatory duty to accept the lowest bid, so that any attempt to invoke or exercise "discretion" appears pointless. "A fundamental requirement of due process is 'the opportunity to be heard.' *Grannis* v. *Ordean*, 234 U.S. 385, 394," quoted in *Armstrong, supra*, 380 U.S. at 552. Neither would any mistaken bidder be afforded the right to be heard, or the right to raise issues in his own defense or to produce evidence, under the decision of the Ohio court, which has effectively denied petitioners these rights by dismissing their cross-petitions in equity and entering judgment for plaintiff, despite the factual findings of bona fide mistake and of equitable entitlement by both lower courts.[15]

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[15] In addition to the foregoing due process arguments, there is a perhaps coextensive equal protection argument. For example, with reference to the evidence of the prior practice of the Ohio Departments of Public Roads and of Public Works, *supra*, n. 12, if these departments' practice of relieving bidders from their *bona fide* mistakes will not be affected by the decision below, by virtue of the fact that different statutory provisions govern, it will be anomalous that mistaken bidders for Ohio school construction contracts will risk ruin, while bidders for the two largest contracting authorities in the State of Ohio will generally be relieved from their mistakes. If, on the other hand, the broad

In the future, where a similar, substantial mistake in bid occurs, the Ohio contracting agency will apparently be entitled to seize the bid deposit or offset with other monies due the mistaken bidder without any judicial proceedings; recourse to judicial process would be in the nature of a collection action.[16] In the case where, as here, the monetary value of the error exceeds the net worth of the mistaken bidder, the statutory bid bond forfeiture apparently permitted by the decision below will result in a drastic deprivation of property without any semblance of due process.

Review by this Court of the decision below will reveal the unconstitutionality of the operation of the bid bond statute, as interpreted by the Ohio Supreme Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Ohio. Alternatively, petitioners request that this case be remanded to the Supreme Court of Ohio for reconsideration in light of the argu-

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language and policy pronouncement of the decision below will govern all contracting authorities within the State of Ohio, it still is anomalous that Ohio bidders who make substantial, material mistakes in bid should encounter financial ruin, while bidders elsewhere are generally relieved of the financial consequences of their mistakes. *Cf. Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-374 (1886).

[16] Plaintiff has adopted this view of the holding below, for it has filed a motion for summary judgment upon the issue of damages in the trial court. In this motion, plaintiff prays for judgment in excess of $210,000, constituting the amount of the bid bond plus interest since June 1961.

ment contained herein, pursuant to the supervisory powers of this Court.*

Respectfully submitted,

PAUL E. MCNULTY
1320 Nineteenth Street, N. W.
Washington, D. C. 20036
Counsel for Petitioners

Of Counsel:

JOHN A. MCWHORTER
JOSEPH M. ZORC
KING & KING
Washington, D. C.

J. PAUL MCNAMARA
MCNAMARA and MCNAMARA
Columbus, Ohio

August 28, 1970

* Note, *The Supervisory Power of the Federal Courts*, 76 Harv. L. Rev. 1656 (1963).

STATUTORY PROVISION INVOLVED

Ohio Revised Code

3313.46. Procedure for bidding and letting of contracts.

When the board of education determines to build, repair, enlarge, or furnish a schoolhouse, or make any improvements or repairs, the cost of which will exceed in city districts, six thousand dollars, and in other districts four thousand dollars, except in cases of urgent necessity, or for the security and protection of school property, it must proceed as follows:

(A) For the period of four weeks, the board shall advertise for bids in some newspaper of general circulation in the district and two such papers, if there are two. If no newspaper has a general circulation in the district, then the board shall post such advertisement in three public places in the district. Such advertisement shall be entered in full by the clerk of the board of education, on the record of proceedings of the board.

(B) The sealed bids must be filed with the clerk by twelve noon of the last day stated in the advertisement.

(C) The bids shall be opened at the next meeting of the board, be publicly read by the clerk, and entered in full on the records of the board; provided that the board may by resolution provide for the public opening and reading of such bids by the clerk immediately after the time for filing such bids has expired, at the usual place of meeting of the board, and for the tabulation of such bids and a report thereof to the board at its next meeting.

(D) Each bid must contain the name of every person interested therein, and shall be accompanied by a bid bond or by a certified check upon a solvent bank, as the board requires, payable to the order of the treasurer of the board of education, in an amount to be fixed by the board or by an officer designated for such purpose by the

board, said bond or check to be in no case less than five per cent of the amount of the bid and conditioned that if the bid is accepted, a contract will be entered into, and the performance of it properly secured.

(E) When both labor and materials are embraced in the work bid for, the board may require that each be separately stated in the bid, with the price thereof, or may require that bids be submitted without such separation.

(F) None but the lowest responsible bid shall be accepted. The board may reject all the bids, or accept any bid for both labor and material for such improvement or repair, which is the lowest in the aggregate.

(G) The contract must be between the board and the bidders. The board shall pay the contract price for the work at the times and in the amounts provided by sections 3313.461 (3313.46.1) and 3313.462 (3313.46.2) of the Revised Code.

(H) When two or more bids are equal, in the whole, or in any part thereof, and are lower than any others, either may be accepted, but in no case shall the work be divided between such bidders.

(I) When there is reason to believe there is collusion or combination among the bidders, or any number of them, the bids of those concerned therein shall be rejected.

IN THE COURT OF COMMON PLEAS, ROSS COUNTY, OHIO

No. 31253

THE BOARD OF EDUCATION, CITY OF CHILLICOTHE, OHIO,
Plaintiff,

v.

SEVER-WILLIAMS CO. INC., ET AL., *Defendants*.

BE IT REMEMBERED, That heretofore, to wit, on Monday, June 13, 1966, being one of the regular days of the April, 1966, term of said Court, before Honorable Thomas Mitchell, Judge, sitting by assignment, this above entitled case came on for trial upon the petition and other papers heretofore filed herein.

APPEARANCES:

Messrs. William W. Stanhope and Phil D. Butler, Attorneys at Law, Chillicothe, Ohio, on behalf of the Plaintiff.

Messrs. Donald McNamara and John Petro, Attorneys at Law, Columbus, Ohio, on behalf of the Defendants.

Mr. Charles Hire, Attorney at Law, Washington Court House, Ohio, on behalf of the Defendants.

Mr. David L. Barrett, Attorney at Law, Chillicothe, Ohio, on behalf of the Defendants.

Opinion

DIRECTED VERDICT

(June 15, 1966)

COURT: Members of the Jury. I called you back to the room so you would understand better what is going on and what I'm about to say. There has been a motion made by the defendant at the end of all the evidence for what we call a directed verdict.

When, at the end of all the evidence, one party or the other makes a motion for a directed verdict, it is the duty

of the Court to examine all the evidence in the case to determine, as a matter of law, if reasonable minds could differ on the interpretation of the evidence. If the Court finds that reasonable minds could not differ, it is his duty, as a matter of law, to direct a verdict one way or the other and take the case from the jury.

Now section 3313.46 of the Revised Code of Ohio and following are the sections relating to public bidding in reference to schools and these sections are designed to protect the public against fraud, collusion and to assure that people get dollar value for the tax money expended. However, these statutes were not intended to punish or bankrupt innocent contractors for their honest mistakes.

In America, business men are fierce competitors and this is the way it should be. Also in America, however, we adhere to the doctrine of fair play and do not attempt to take advantage of an innocent person who has made an honest mistake.

In this case, we must remember we are not dealing with the interpretation of a construction contract, for there was no contract ever entered into. These bids are in the nature of offers and there are no bilateral obligations unless they are accepted.

Therefore, if before the acceptance, there is an honest mistake made as to the figures and if the Board of Education had actual or constructive notice, there could be no meeting of the minds. It is also true, however, that even without notice and after acceptance, if there was an honest mistake made by a contractor, a Court of equity has the power to relieve him of what might be otherwise an impossible financial burden upon a small company.

In this case, we have one fact admitted by both sides and that is that the Sever-Williams Company is a responsible, respected company. The Board itself acknowledged the fact that defendant had previously done work for

them satisfactorily. This company has built several schools and is respected, even among its competitors.

This is no fly-by-night company and the plaintiff has offered absolutely no evidence of any kind to show any bad faith on the part of the defendant or any act of negligence on the part of the defendant, although, of course, we realize every mistake of everyone involves some element of negligence.

The defendant company had absolutely no motive or personal gain by making any intentional error. In fact, if the correct bid was submitted, the defendant company would have lost the job to the Knowlton Company by over three thousand dollars, the company, incidentally, that actually did the job.

The work was performed under the architect's overall estimate, although I'm certain at loss to understand how a Board of Education can intelligently decide the validity or amount of base bid without an architect's estimate. Is it then fair or equitable for the Board of Education to take advantage or attempt to take advantage of this mistake of omission?

Even the evidence of the plaintiff reveals that the mistake was brought to their attention within twenty-four hours after the bids were opened. There is also some evidence that constructive notice was received by the plaintiff within an hour after the bids were opened. Whether it was the same day or not, I do not regard as too material. The evidence is undisputed that the architect who represented the Board had notice the same day because he said he did.

The State of Ohio is the largest builder of public buildings in the state and even its policy is that when the bids are opened and there appears a large discrepancy indicating a mistake, if the contractor is a reputable firm with whom if has done previous business; it immediately noti-

fies him and if the mistake was an honest one, gives him the right to withdraw his bid or rejects all bids and re-advertises.

I'm not impressed with the Board's reasoning for failure to do that in this case. Naturally, the public interest must be protected. But in this instance, the public suffered no loss.

The question is whether the Board should be unjustly enriched at the expense of another. After all, two thousand and sixty-six years ago, the world made a grievous mistake that was forgiven for this mistake and surely we can do no less.

Therefore, as a matter of law, I find the defendant is entitled to the relief prayed for in the cross petition and I hereby direct a verdict in its favor.

I wish to thank the jury very much for their kind attention to this case. Nothing further, the jury may be dismissed.

IN THE COURT OF APPEALS, ROSS COUNTY, OHIO

No. 523

THE BOARD OF EDUCATION OF THE CHILLICOTHE CITY SCHOOL DISTRICT, *Plaintiff-Appellant*

v.

SEYER-WILLIAMS COMPANY, INC.

and

FEDERAL INSURANCE COMPANY, *Defendant-Appellees*

Opinion

(July 26, 1968)

GRAY, J.

This cause is in this court on appeal on questions of law and fact from a judgment rendered by the Court of Common Pleas of Ross County, wherein that court granted a motion for a directed verdict at the conclusion of all of

the evidence; plaintiff's petition was dismissed and the prayer of the amended cross-petition was granted rescinding the bid and bid bond of defendant Sever-Williams Company, Inc.

A petition was filed by plaintiff alleging that it advertised for bids for the construction of a new High School which it proposed to have built.

The petition alleged that defendant Sever-Williams Company submitted a bid, consisting of a base bid of $1,242,000.00 with certain alternates. Defendant Sever-Williams Company with the bid submitted a bid bond in the sum of $137,000.00 with defendant Federal Insurance Company, as surety thereon.

The petition further alleges that at a meeting of plaintiff's board on June 20, 1961 the board accepted the bid of defendant Sever-Williams Company and awarded the construction contract to it; that defendant Sever-Williams Company failed and refused to enter into a contract with plaintiff in accordance with its bid; that defendant Sever-Williams Company refused to give a performance bond and that defendant Sever-Williams Company notified plaintiff that it was withdrawing its bid and would not enter into a contract nor would it execute and furnish a performance bond.

Plaintiff further alleges that it was necessary that it award the contract to the next lowest bidder and that the difference in the bid of defendant Sever-Williams Company and the contract price of the next lowest bidder was $141,500.00.

Plaintiff further alleges that the amount of damages exceeded the penalty of the bid bond; that there is due and owing to it from defendants the sum of $137,000.00 as a result of the damages suffered by it to the extent such damages were covered by the penal amount of the bond.

The petition prayed for damages in the sum of $137,000.00 jointly and severally from the two defendants.

A second amended answer and cross-petition of defendant Sever-Williams Company was filed. In this pleading defendant Sever-Williams Company admitted that it submitted a base bid of $1,242,000. which bid through inadvertence and oversight contained a mistake in that an item of $145,000.00 was omitted.

Defendant Sever-Williams Company also alleged that when the bids were opened June 20, 1961 noting a difference in its bid and the next lowest bid, re-examined its bid sheets and then discovered its error in the bid in that it omitted a $145,000.00 item so that the base bid submitted was $1,242,000.00.

Defendant avers that during the meeting of plaintiff board it notified plaintiff of the mistake of $145,000.00 in its bid and that this defendant would not enter into a contract for the construction of the school for the sum of $1,242,000.00.

That on June 21, 1961 defendant Sever-Williams Company sent plaintiff a telegram notifying plaintiff of the mistake.

Defenedant Sever-Williams Company prays that the erroneous bid and bid bond submitted by it be ordered cancelled.

The facts developed at the trial of this matter show that the bids were opened in the school auditorium and that many people were present including representatives of other bidders. That when Mr. Puckett, representative of defendant Sever-Williams, learned of the amounts of the other bids he realized there must have been an error in the bid of his company. He immediately called the office of defendant Sever-Williams Company and upon re-examining the items of its bid discovered the omission of the $145,000.00 item. Mr. Puckett shortly thereafter told Mr. Cupp, the architect's representative, that an error had been made in the bid defendant Sever-Williams Company submitted. Mr. Puckett and Mr. Cupp then discussed the error.

Mr. Puckett further testified that he and Mr. Cupp discussed the error in the presence of several people who were members of the school board on June 20, 1961. However, he did not appear before the board while it was in formal session on that day.

The bid of defendant Sever-Williams Company was accepted and the contract was awarded to defendant Sever-Williams Company shortly after 1:05 P.M. on June 20, 1961.

On June 21, 1961 at 1:41 P.M. a telegram was sent plaintiff by defendant Sever-Williams Company in which it is stated that on June 20 at approximately 2:00 P.M. defendant Sever-Williams Company notified the plaintiff that there was an error in the bid in the omission of an item in the amount of $145,000.00. Defendant withdrew its bid and requested plaintiff to disregard its bid in the determination of the low bid and in the award of the contract. Defendant Sever-Williams Company further stated that it would show plaintiff its bid sheets exhibiting the error in the bid.

On June 26, 1961 at 3:18 P.M. a telegram was sent by defendant Sever-Williams Company to the plaintiff to the attention of Paul Hydell, Superintendent of Schools, Chillicothe School District that it had received a copy of resolution of plaintiff awarding contract to defendant Sever-Williams Company and that plaintiff was thereby informed that defendant Sever-Williams Company would not execute a contract on its bid submitted June 20, 1961.

At the regular meeting of plaintiff on June 27, 1961, a resolution of the board of directors of defendant Sever-Williams Company was presented to plaintiff stating in substance that defendant Sever-Williams Company would not enter into a contract with plaintiff based on bid submitted June 20, 1961, containing a mistake of $145,000.00.

The record further shows that defendant Sever-Williams Company had a net worth of approximately $130,000.00.

It was developed by the evidence that materialmen and sub-contractors were late in submitting their figures and that the final tabulation of the bids was made on the morning of June 20, 1961.

The base bids as tabulated show the following figures:

Knowlton, Inc.	$1,383,500.
Sever-Williams Co.	$1,242,000.
Weithman Brothers	$1,411,720.

The bid was later awarded to Knowlton, Inc. for its base bid of $1,383,500.00.

The bid sheets of defendant Sever-Williams Company were introduced into evidence to exhibit the error in the bid.

Mr. Cupp, representative of McLaughlin and Keil, architects employed by plaintiff, testified as follows:

"Q. Can you tell us about what time the recess occurred in respect to the time the bids were opened? That is, how soon after the bids were opened did you have this occasion to talk with Mr. Puckett, according to your best recollection?

A. The bids were read at twelve o'clock, and as I recall, it took somewhere between a half, an hour, forty-five minutes, to read all the bids received. As soon as we could get into the Board Room, the Board went into session, and I think it was probably about two o'clock when we got up and left the Board Room, and at that time I met Mr. Puckett—I don't recall if it was in the outer office or in the corridor—at which time he talked to me about his bid.

Q. And was it at that time that he told you that he had made a mistake in his bid, in the approximate amount of $145,000.00?

Mr. Stanhope: Object.

Court: Overruled.

A. He told me that he had checked his bid, checked with his office, and found out where his error was,

and it was approximately $145,000.00, $140,000.00 that he had—an item that he told me he had omitted from his bid.

Mr. Stanhope: Ask the answer be stricken.

Court: Overruled.

Q. Were you satisfied, Mr. Cupp, from your conversation with Mr. Puckett that there was, in fact, a mistake in the Sever-Williams bid?

Mr. Stanhope: Just a moment.

A. I was satisfied with—

Mr. Stanhope: Just a moment, Mr. Cupp.

A. —his statement.

Mr. Stanhope: Just a moment, Mr. Cupp. Would you read the question?

(The question was read)

Mr. Stanhope: Object.

Court: Overruled.

A. I was satisfied with his statement.

Mr. Stanhope: I ask that the answer be stricken.

Court: Overruled.

Q. Would you amplify that and tell us why you were satisfied, Mr. Cupp?

Mr. Stanhope: I object to that, too.

Court: Overruled.

A. First, I suspected that there was an error in his bid because of the difference between his bid and that of the Knowlton Company, whom I know to be very low bidders. It didn't seem reasonable to me that there would be that much difference between the two bids. I was satisfied for another reason in that I have been acquainted with Mr. Puckett for nearly 20 years or more, approximately 20 years, and during those years working for the Sever-Williams Company, he has built many buildings that we have designed, and in all the years that I have dealt with him, I have

never known him to lie to me or even to try to deceive me, which is something I cannot say for other contractors that we have dealt with to a great extent.

Mr. Stanhope: I ask that the answer be stricken.

Court: Overruled.

A. (Continuing) I had complete confidence in his honesty.

Mr. Stanhope: I ask that the answer be stricken.

Court: Overruled.

Q. When the meeting of the Board of Education resumed following your conversation with Mr. Puckett at the recess on June the 20th—

A. June the 20th.

Q. —1961, did you report to the Board the substance of your conversation with Mr. Puckett?

Mr. Stanhope: Object.

Court: Overruled.

A. Before, the Board went into session again, I called a couple of the Board members aside and told them of the statement that Mr. Puckett had made. After that the Board went into session again and discussed his bid further.

Mr. Stanhope: Ask that the answer be stricken.

Court: Overruled.

Q. And the fact that he had advised you of the mistake in his bid was a part of the discussion?

Mr. Stanhope: Object.

Court: Overruled.

A. That was the main point of discussion.

Q. The main of the discussion?

We believe this testimony to be highly significant and we attach great weight to it.

We are of the opinion that the trial court was correct in its judgment.

Research has turned up a plethora of cases to substantiate our position. The Author of the annotation appear-

ing in 52 ALR (2) 792, at page 796 makes the following statement:

> "In the typical situation here presented, so firmly has the rule favoring equitable relief against unilateral mistake became established that no case has been discovered in which it has not been granted, by way of rescission or similar or appropriate relief, where there is a combination of circumstances establishing remediable mistake and timely communication of knowledge to and assertion of the right to relief against the other party."

In *State Highway Commission* v. *State Construction Company* (1955) 203 Or. 414, 280 P (2) 370, 52 ALR (2) 779 the facts are similar to the case we presently have under consideration. The State of Oregon brought an action at law to recover the sum of $8,634.95 against the State Construction Company. Defendant answered plaintiff's petition and pleaded affirmative matters arising out of the case which required the interposition of a court of equity. Under the Oregon Statute the action at law was stayed and the case proceeded as a suit in equity. The Supreme Court of Oregon granted equitable relief to the defendant.

In one of the head notes to this case on page 781 it is stated:

> "A loss or injury to the state constituting sufficient ground for denying equitable relief to a bidder for a public contract basing his bid on a substantial mistake of fact cannot be predicated on the gain to be derived by a forfeiture of the bidder's bond, or on the necessity of accepting a higher bid."

Apropos of the present circumstances the Author in 52 ALR (2) 793 states:

> "Consequently 'acceptance' as used in most of the cases does not mean the formation of a contract as in

the law of private contracts, but is simply descriptive of some act indicative of approval or award, with the intent of subsequently executing a formal contract."

The Author further states at p. 803:

"Even where notice of the situation is given to a public body as offeree after acceptance of a bid but before a formal contract has been executed, several cases announce and apply the rule that where a bidder for a public contract makes a unilateral mistake in preparing his bid, which is otherwise remediable, he may have equitable relief by rescission or cancellation or in the nature thereof, where the notice was reasonably prompt and the offeree has not altered its position so that relief would work a hardship on it, and there are no other circumstances which would render it inequitable to grant such relief."

We believe that the mistake of defendant was of so fundamental a character that the minds of the parties did not meet. The mistake of defendant under the circumstances, was not the result of such culpable negligence as to bar defendant Sever-Williams Company redress. The contract was still executory and plaintiff had not been prejudiced. *State of Connecticut* v. *F. H. McGraw & Co.* 41 F. Supp. 369, 373.

In 2 Kent, Comm. Sec. 477, the following rule is declared:

"Mutual consent is requisite to the creation of the contract, and it becomes binding when a proposition is made on one side and accepted on the other; and on the other hand, it is not contract if there be an error or mistake of a fact, or in the circumstance, going to the essence of it. This is a clear principle of universal justice. "Non videtur qui errant consentive." It is an equitable rule, declared by Mr. Kent, 'that he who

> errs is not considered as consenting.' In this case the appellee erred by what appears to be an excusable mistake." 1 Story Eq. Jur. 10th ed. Sec. 138 i.

In *Kutche* v. *Ford*, 22 Mich. 442, 192 NW 714, the court said:

> "To place in statu quo does not mean that one shall profit out of the mistake of another * * *".

To this statement may be added the observation made by the Court in *Rushlight Automatic Sprinkler Co.* v. *City of Portland*, 189 OR 194, 245 219 P (2) 732, 753:

> "To be denied the privilege of taking advantage of another's mistake is not to suffer damage."

Of the multitude of cases involving this proposition of law we wish to cite the following:

> *Union Free School District No. 1, Town of Islip, Suffolk County, N.Y.* v. *Gumbs*, 191 NY S (2) 183;
> *Kemp* v. *U. S.*, 38 F. Supp. 568;
> 70 ALR (2) 1375;
> *Bd. Ed. of Floyd County* v. *Hooper* (Ky) 350 S.W. (2) 629.

The action taken by the trial court was not erroneous. Therefore, the judgment of that court is affirmed.

JUDGMENT AFFIRMED

Carlisle, PJ & Abele, J. concur

IN THE SUPREME COURT OF THE STATE OF OHIO

BOARD OF EDN. OF CHILLICOTHE CITY SCHOOL DISTRICT,
Appellant,

v.

SEVER-WILLIAMS CO., INC., ET AL., *Appellees.*

Syllabus.

Public contracts—Procedure for letting bids—Statutory requirements to be complied with—Bid for construction of school building—Bid bond required—A separate contract—Becomes effective and terminates, when—Strict compliance with R. C. 3313.46 required—Bid bond contract terminated in accordance with its terms.

It is within the statutory power of the General Assembly to lay down rules governing the procedure for the letting of public contracts, and where a validly enacted statute sets forth requirements governing the letting of public contracts which are reasonably calculated to preserve the integrity of public contracts and to secure performance thereunder, the parties must comply with those requirements.

R. C. 3313.46 requires the submission of a bid bond with an offer to contract with a board of education for the erection of a school building, as a condition of consideration of the offer. The bond contract, which is separate from the offer and becomes effective at the time the offer is lawfully opened and accepted, speaks for itself and has no implied dependence on the effect or terms of any other contract, excepting only that by its terms the bond contract ends when the principal makes payment under it or enters into a final performance contract under the terms of its bid. Otherwise, the bid bond remains in full force and effect.

The possible abuses of amending or changing bids after a formal opening of sealed bids, or of favoring one

bidder over another, endangers the sanctity of sealed bids. The public benefit resulting from a strict compliance with the requirements of R. C. 3313.46 outweighs any benefits to the principals on a bid bond releasing them from liability because of a mistake in the computation of the bid.

Just as bids must be filed by a time certain, and late bids are not considered, so must cancellation or withdrawal of a bid be made before it is opened and the bid bond contract becomes effective. After a bid bond contract becomes effective, it may be terminated only in accordance with its own terms.

Opinion

(No. 68-670—Decided May 6, 1970.)

APPEAL from the Court of Appeals for Ross County.

This action was instituted by the Board of Education of the Chillicothe City School District against Sever-Williams Company, Inc., and the Federal Insurance Company. In its petition, plaintiff alleges that it adopted a resolution approving and accepting the plans, specifications and estimates for a new high school, with direction to its clerk to advertise for bids in a newspaper of general circulation for a period of not less than four (4) weeks; that the advertisement appeared in an accredited newspaper and directed that sealed proposals be filed by bidders on or before June 20, 1961, at 12:00 o'clock, noon, Eastern Standard Time.

It is alleged further that Sever-Williams submitted a bid in compliance with the terms and conditions of the legal notice, in the amount of $1,242,000, together with a bid bond in the sum of $137,000, in which the plaintiff, the board of education, is the obligee, Sever-Williams is the principal, and Federal Insurance is the surety.

It is alleged also that the board of education accepted the bid of Sever-Williams, and awarded that company a

contract for the construction of the high school "but the said defendant * * * failed and refused to enter into a contract * * * under the terms and conditions of the said bid * * * and refused to give the plaintiff a bond of good and sufficient surety for the faithful performance of such contract. Thereafter, on the next day, June 21st, 1961, the defendant Sever-Williams notified the plaintiff that it was withdrawing its bid and would decline to enter into said contract or to furnish and execute said [performance] bond.

"* * * thereafter, on June 26th, 1961, the said defendant * * * again refused to enter into said contract and to furnish said bond and by telegram, withdrew its bid, and as a result thereof, it was necessary for the plaintiff to award the contract to the next low bidder, and that the difference between the amount specified in said bid of Sever-Williams Company, Inc., as secured by the bid bond of the Federal Insurance Company, and the amount for which the obligee legally contracted with another party to perform the work covered by the bid, amounted to $141,500."

The petition concludes with a prayer for judgment in the amount of $137,000, plus costs and interest claimed to be owing "as a result of the damages suffered by the plaintiff to the extent that they are covered by the bond submitted with the bid."

In answer to the petition, Sever-Williams admits its refusal to enter into a contract pursuant to its bid, because, through inadvertence, oversight and mistake, an item of $145,000 had been omitted from the bid. In a cross-petition, in which the prayer was "that the erroneous bid and the bid bond" be ordered cancelled, Sever-Williams alleged that after the bids were opened it "learned that the base bids submitted by Sever-Williams was substantially lower than other base bids submitted"; that upon re-examination of its bid calculations it discovered that

through inadvertence and oversight an item of $145,000 had not been included in the base bid submitted; that "at the time of the opening of the bids and prior to acceptance of any bid by the board of education, the board of education had notice that the base bid of Sever-Williams contained a mistake and that Sever-Williams would not enter into a contract with the board of education pursuant to the base bid of $1,242,000; that "the cost to perform the work included in the base bid submitted by Sever-Williams would have exceeded the amount of the base bid submitted by Sever-Williams, namely, $1,242,000. The performance of the work by Sever-Williams pursuant to the base bid submitted would have resulted in a loss to Sever-Williams. On or about June 27, 1961, the board of education entered into a contract with Knowlton, Inc., for the construction of Chillicothe Senior High School without additional cost to the board of education."

The answer and cross-petition filed by the defendant Federal Insurance Company was, in substance, the same as the pleadings of Sever-Williams.

At the conclusion of the evidence, the Court of Common Pleas granted defendants' motion for a directed verdict and dismissed the petition. It likewise granted the prayer of the amended cross-petitions by rescinding the bid and bid bond of the defendants.

Upon appeal, the Court of Appeals affirmed the judgment entered upon the directed verdict and entered its judgment on the defendant's amended cross-petitions by rescinding and cancelling the bid and bid bond submitted on June 20, 1961, by Sever-Williams (16 Ohio App. 2d 7).

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Mr. William W. Stanhope and *Mr. Phil D. Butler*, for appellant.

Messrs. McNamara & McNamara, Mr. John J. Petro and *Mr. Charles S. Hire*, for appellees.

DOYLE, J. In compliance with statutory requirements (R. C. 3313.46) the Board of Education of the Chillicothe City School District invited bids for the construction of a high school. It advertised the fact in a newspaper of general circulation for a period of four weeks; it instructed that sealed proposals for the construction of the building in accordance with the plans and specifications on file would be received by the Clerk of the Board of Education for the board at its office "until 12 o'clock noon, Eastern Standard Time on Tuesday, June 20, 1961, and [bids] will be opened and read aloud immediately thereafter"; it stated that each bid must be accompanied by a surety company bond or certified check in an amount equal to ten per cent of the bid "as a guarantee that if the bid is accepted, a contract will be entered into in accordance with the drawings and specifications and general conditions of the contract and bond form on file * * *." The publication further directed that "no bidder may withdraw his bid for a period of thirty days after the opening thereof."

The board of education met on June 20, 1961, and at an open meeting the three bids which had been submitted before the so-called dead line were opened and read. Sever-Williams was found to have submitted the lowest bid and was found by the board to satisfy the statutory requirement of being the "lowest responsible" bidder and was awarded the bid at the meeting immediately following.

When the bids were opened and read, a Mr. Puckett, vice-president and representative of Sever-Williams, observed a substantial difference between his company's bid and the bids of the two other bidders. He thereupon contacted the office of his company, and, upon examination of the items of his company's bid, discovered the omission of an item totaling $145,000. He informally discussed the question of error with a representative of the firm of architects employed by the board of education, but did not discuss the matter with the board.

As heretofore stated, the bid was accepted by the board on June 20, 1961, shortly after the bids were opened.

On June 21, 1961, a contract was awarded to Sever-Williams as the lowest responsible bidder. After the award of the contract, a telegram was received by the board, from Sever-Williams, reading, in part, as follows:

"This will confirm our notice given to you yesterday that there was a mistake in our bid. We hereby withdraw our bid and request that our bid be disregarded in determination of the low bid and in the award of the contract."

The reference in the telegram to a confirmation of "notice given to you yesterday" obviously refers to Mr. Puckett's discussion of the error with an agent of the firm of architects and several school board members. On June 26, 1961, another telegram was sent by Sever-Williams to the board of education. It reads, in pertinent part:

"We have received a copy of your resolution and this is to inform you that we will not execute a contract on our bid submitted June 20, 1961, which contained a mistake in amount of $145,000. We will take any legal action necessary to protect our rights."

A formal resolution of Sever-Williams was then presented to the board of education stating that it would not enter into a contract based upon its bid of June 20, 1961.

It is within the statutory power of the General Assembly to lay down rules governing the procedure for the letting of public contracts, and where a validly enacted statute sets forth requirements governing the letting of public contracts which are reasonably calculated to preserve the integrity of such contracts and to secure performance thereunder, the parties must comply with those requirements.

In R. C. 3313.46, the General Assembly has directed the method by which a building contractor may secure a contract with a board of education. It requires that contracts be awarded only after the opening of sealed bids, which must be accompanied by a bond conditioned that if the bid is accepted a contract will be entered into and the performance of it properly secured.

It thus appears that, in the letting of public contracts, the Ohio Code requires that two bonds be given. First, the bid bond, which must be filed with the bid. Then, if a contract is awarded the bidder, a performance bond is required in connection with the execution of the formal contract for the performance of the work.

In the instant case, the bid bond, upon which this suit is predicated, was presented with the bid for the work in the amount of $137,000, and the bid for the work was in the sum of $1,242,000, plus alternatives. The amount of the bond was well within the provisions of R. C. 3313.46, which, in pertinent part, reads:

"* * * said bond * * * to be in no case less than five per cent of the amount of the bid and conditioned that if the bid is accepted, a contract will be entered into, and the performance of it properly secured."

It is claimed by the defendant contractor that, "where a bidder on a public construction contract through an inadvertent clerical error, omits an item from the bid submitted, the bidder is entitled to the rescission of the bid and bid bond if the bidder can establish that (1) the mistake was material; (2) the enforcement of a contract pursuant to the terms of the erroneous bid would be unconscionable; (3) the mistake did not result from a violation of a positive legal duty or from gross negligence; (4) there is no prejudice to the public authority except the loss of the bargain; and (5) prompt notice of the error is given."

The above grounds for rescission find support in some cases in other states. In this state, however, no case involving similar facts has been heretofore decided.

It is obvious that this action is brought by the board of education for recovery in the amount of the bid bond executed by Sever-Williams and Federal Insurance. The amount asked is the amount specified in the bond ($137,000,) not compensation for the extra cost of the work, which appears to be in the sum of $141,500; nor is the suit for specific performance of the contract.

In simple terms, the bid bond contract, by its very terms, went into full force and effect when the bid was accepted by the board of education. Also, by its very terms, the obligations contained therein could be terminated only if Sever-Williams entered into a construction contract and furnished another bond (performance bond) as required by statute, or, in the event of the contractor's refusal to enter into a contract and give a performance bond, to pay to the board of education the difference, not to exceed the "penalty" in the amount of $137,000, between the amount specified in the bid for the work and the amount for which the board of education may legally contract with another party to perform the work covered by the bid.

There are no conditions in the bond itself, nor in the advertisement for bids, that any mistake in the office of the bidder, prior to the making of the bid, may operate as a cancellation of any of the provisions of the bid bond contract. When Sever-Williams made its bid, it said exactly what it then intended to say, and it conveyed to the board of education, when the bid was opened and accepted, exactly the meaning that it intended to convey. Here, we have exact agreement in intention, as well as in expression. The mistake was one of computation wholly antecedent to the expressed intention and communicated offer. These circumstances create a valid contract, enforceable against the bidder.

This is the contract, the statutory bond guaranteed and which committed Federal Insurance to the obligations specifically set forth therein in the event of a failure of its principal to enter into a further contract and give a performance bond.

The question here presented, does not concern a construction contract, for it does not involve resulting damages or specific performance. This case is based on the bid bond contract and, while it is related to a construction contract, it is entirely separate therefrom and must be examined from the four corners of the bid bond contract. Such contract is consideration for the board of education

to open and consider the bid, toward a possible award of a construction contract. The board of education completed this consideration.

In summary, this accepted contract contained in the bid bond says:

"If the obligee [board of education] shall accept the bid of the principal [Sever-Williams Company] and the principal shall enter into a contract with the obligee [board of education] in accordance with such bid and give a bond with good and sufficient surety for the faithful performance of such contract, *or in the event of the failure of the principal to enter into such contract and give such bond, if the principal shall pay to the obligee the difference, not to exceed the penalty thereof, between the amount specified in said bid and the amount for which the obligee may legally contract with another party to perform the work covered by said bid, if the latter amount be in excess of the former, then this obligation shall be null and void, otherwise to remain in full force and effect.*" (Emphasis added.)

Certainly the General Assembly did not intend that the required bid bond should be a meaningless contract when accepted. Obviously its purpose is to compel the bidder to enter into a contract if his bid is accepted, or to compensate the public body, at least to some extent, for losses incurred if the bidder defaults.

A decision to hold a negligent bidder liable on his contract, where he has actually made a mistake in the preparation of his bid, may seem a hardship, but if the statute is to have any effect that must be the result. The statute is an essential part of the bidder's proposal and he makes all of its terms and conditions an obligation upon himself when he submits a bid. When the General Assembly enacted R. C. 3313.46, it created no exceptions for situations such as are here presented. In fact, it specifically provided the penalty as indicated above, "in the event of the failure of the principal to enter into such contract and

give such [performance] bond." Cf. *Colella* v. *Allegheny County*, 391 Pa. 103, 137 A. 2d 265.

The legislative intent which prompted the passage of R. C. 3313.46 was obviously to provide for open and honest competition in bidding for public contracts and to save the public harmless, as well as bidders themselves, from any kind of favoritism or fraud in its varied forms. The statute must be enforced and relief in equity denied.

Therefore, the judgment of the Court of Appeals is reversed and this court enters final judgment in favor of the plaintiff and against the defendants on defendants' cross-petition; and the judgment of the Court of Appeals in favor of defendants on plaintiff's petition is reversed, and the cause is remanded to the Common Pleas Court for trial on the issue of damages under the terms of the bond.

Judgment accordingly.

O'NEILL, C. J., HERBERT, DUNCAN and CORRIGAN, JJ., concur.*

SCHNEIDER, J., concurs in the judgment. The bids were opened on June 20, 1961, but appellee did not promptly seek relief from the mistake resulting from its own negligence. It was thus barred by laches from asserting its claim for rescission when appellant finally brought this action to protect itself as late as February 1962, after appellant had awarded a new contract to the next highest bidder.

However, I do not concur in the syllabus which overturns a long-standing rule followed in many political subdivisions in Ohio as expressed by *Toledo* v. *Schulters* (1896), 11 C. C. 528, and *Ferro Concrete Construction Co.* v. *Board of Education of Cincinnati* (1911), 11 N. P. (N. S.) 86.

DOYLE, J., of the Ninth Appellate District, sitting for MATTHIAS, J.

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* CHIEF JUSTICE TAFT participated in this case which was, however, decided after his death.

THE SUPREME COURT OF THE STATE OF OHIO

The State of Ohio, City of Columbus

1970 TERM

To wit: June 3, 1970

No. 68-670

REHEARING

BOARD OF EDUCATION OF CHILLICOTHE, CITY SCHOOL DISTRICT, *Appellant*,

v.

SEVER-WILLIAMS CO., INC., ET AL., *Appellees*.

Order

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. ... Page ....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 3rd day of June 1970

THOMAS L. STARTZMAN Clerk

By /s/ SAM F. ADKINS Deputy

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IN THE

Supreme Court of the United States

October Term, 1970

No. 613

SEVER-WILLIAMS COMPANY, INC.,
and
FEDERAL INSURANCE COMPANY,
Petitioners,

vs.

THE BOARD OF EDUCATION OF THE
CHILLICOTHE CITY SCHOOL DISTRICT,
Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

BRIEF OF THE RESPONDENT, THE BOARD OF EDUCATION OF THE CHILLICOTHE CITY SCHOOL DISTRICT

WILLIAM W. STANHOPE
P. O. Box 437
15-17 North Paint Street
Chillicothe, Ohio 45601

PHIL D. BUTLER
2 West Fourth Street
Chillicothe, Ohio 45601
Special Counsel for Respondent.

September 24, 1970

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43216

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No. 613

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BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

BRIEF OF THE RESPONDENT, THE BOARD OF EDUCATION OF THE CHILLICOTHE CITY SCHOOL DISTRICT

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on May 6, 1970, after the case had been admitted by the Ohio Supreme Court on January 24, 1969, by the granting of a motion to certify. The cause was remanded to the Common Pleas Court for trial on the issue of damages under the terms of the bond.[1] Suit was brought by respondent under the provisions of Ohio Revised Code 2307.06 to recover the damages suffered by respondent as a result of petitioner, Sever-Williams Company, Inc., failure to enter into the contract called for in the bid award. The

[1] Mandate, Ohio Supreme Court to Ross County Common Pleas Court Appendix (I)

Supreme Court of Ohio, in admitting the case on motion to certify did so as a matter of great public interest.

Petitioners raised no federal questions on the statute or its interpretation until a motion for rehearing was filed in the Supreme Court of Ohio after its decision in the cause, which motion was overruled. There was no attempt by petitioners to raise the issue during trial of the cause although, as petitioners admit, respondent raised the issue of equal protection and due process.

Petitioners herein seek relief in equity from the mistake by one petitioner, (Sever-Williams Company, Inc.). The other petitioner, compensated surety,[2] had entered into a contract to insure under the terms of the Ohio statutes. There were no conditions in the bond regarding cancellation of the bond in event of mistake. The issue was raised in all previous courts, ruled upon, and commented upon directly by Justice Schneider of the Ohio Supreme Court, who pointed out that petitioners made no effort to seek relief in equity prior to respondent filing suit at law on the bond, in February, 1962, which was more than six (6) months after the alleged incident.[3]

The Ohio court decided the case upon the bid bond contract which bond was given as consideration for the respondent to open and consider the bid and was a requirement established by the General Assembly of Ohio.[4]

The petitioners were heard below on all issues now being proposed as federal questions without at any time raising the issues as a constitutional or federal question in the lower courts, prior to the motion for rehearing. It is the respondent's contention that since this case represents the interpretation of a state statute established by legislative.

[2] Defendants Exhibit E, P. 67 Record, Premium Expense
[3] P. 6 Record, Plaintiff's Answer to Amended Cross-Petitions
[4] O.R.C. 3313.46 (D) Appendix (II)

body of the State of Ohio governing the conduct of Boards of Education and bidders in the State of Ohio, that there is no federal question presented and that the petition for writ of certiorari should be denied.[5]

REPLY TO CLAIM OF QUESTIONS PRESENTED

1. The State of Ohio is not unconstitutionally enforcing an "unconcionable bargain". The mandate of the court is for trial on the issue of damages under the terms of the bond.[1] The issue of damages has not yet been heard or determined.[6] This bond is petitioners. A motion for summary judgment was filed upon return of the mandate to the lower court. This case has been at trial since February, 1962, and the statutes of Ohio provide for the payment of interest on instruments for the payment of money only from the time the amount is due.

2. Both administrative and judicial consideration were given petitioners. The Board of Education of the Chillicothe City School District waited six (6) months for petitioners to seek equitable relief before filing to recover their damages under the bond. The petitioners raised the claim "mistake" which was considered by all courts and was the reason for the reversal of the lower courts. Justice Schneider in his concurring opinion said:

> "The bids were opened on June 20, 1961, but appellee (petitioner) did not promptly seek relief from the mistake resulting from its own negligence. It was thus barred by laches from asserting its claim for a recission when appellant brought this action to protect itself as late as February, 1962, after appellant (respondent herein) had awarded a new contract to the

[5] Cramp v. Board of Public Instruction of Orange County, Fla, (1961) 82 S. Ct. 275, 368 U.S. 278, 72 L ed 2d 285

[6] Note 1, Mandate, Ohio Supreme Court, Appendix (I)